Supreme Court, U. S.
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80-1132

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERTA JEAN GALLI RUSSELL, - - Petitioner

versus

WILLIAM LEE RUSSELL, - - - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

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QUESTION PRESENTED

Does the system of statutes enacted by the U. S. Congress establishing military retirement benefits pre-empt the Commonwealth of Kentucky from treating army retired pay as marital property divisible between spouses upon dissolution of marriages?

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No. _____

ROBERTA JEAN GALLI RUSSELL, - - *Petitioner*

v.

WILLIAM LEE RUSSELL, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

The petitioner, Roberta Galli Russell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals which was entered in this proceeding on April 25, 1980, discretionary review of that judgment by the Kentucky Supreme Court having been declined on October 7, 1980.

QUESTION PRESENTED

Does the system of statutes enacted by the U. S. Congress establishing military retirement benefits preempt the Commonwealth of Kentucky from treating army retired pay as marital property divisible between spouses upon dissolution of marriages?

PARTIES

In addition to the parties set forth in the caption, at the Kentucky Court of Appeals stage to this proceeding counsel for the petitioner, Keith and Myers, 317 West Ninth Street, P. O. Box 1045, Hopkinsville, Kentucky were a party for the purpose of seeking an allowance of attorney's fees. Review of the Court's disposition of the attorney's fee issue was not sought in the Kentucky Supreme Court.

OPINIONS BELOW

The Kentucky Supreme Court on October 7, 1980 summarily denied Roberta Galli Russell's Motion for Discretionary Review without opinion. (App. B, *infra*). The opinion of the Kentucky Court of Appeals rendered April 25, 1980 is reported at *Russell* v. *Russell,* Ky. App., 605 S. W. 2d 33 (1980). (App. A, *infra*). The Christian Circuit Court's Findings of Fact, Conclusions of Law and Final Decree of Dissolution and Judgment entered June 4, 1979, is unreported. (App. C, *infra*).

JURISDICTION

The Kentucky Court of Appeals opinion was rendered on April 25, 1980. Your petitioner's timely Motion for Discretionary Review by the Kentucky Supreme Court was denied by order of that Court on October 7, 1980. This petition for certiorari has been filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 *U.S.C.* Section 1257(3). *American Ry. Exp. Co.* v. *Lever,* 263 U. S. 19 (1923). The respondent argued below, and the trial court and Court of Appeals held, that a disposition of military retirement benefits as divisible marital property pursuant to state dissolution of marriage laws would conflict with the federal statutory scheme for allocation of those benefits. Consequently, the Court of Appeals held that under the Supremacy Clause of the United States Constitution, the inconsistent state law must yield.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved in this case are as follows:

I. *United States Constitution, Article VI, clause 2:*

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

II. KRS 403.190, particularly subparagraph (3) of that statute reprinted below. The statute in its entirety is set forth in Appendix D, together with the three leading Kentucky cases finding pension plans to be included in the definition of marital property.

KRS 403.190(3): All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

III. Title 10 *U.S.C.* Sections 3911, 3929, and 3991:

a. 10 *U.S.C.* Section 3911: Twenty years or more: regular or reserve commissioned officers

The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who had at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer.

b. 10 *U.S.C.* Section 3929: Computation of retired pay: law applicable

A member of the Army retired under this chapter is entitled to retire pay computed under chapter 371 of this title.

c. 10 *U.S.C.* Section 3991: Computation of retired pay

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the

column headed "For sections," retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401 of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title. (Table For Computations Follow).

STATEMENT OF THE CASE

The parties were married on December 31, 1954. Some 24 years and 4 daughters later, the respondent initiated a dissolution of marriage proceeding in the Christian Circuit Court. He had retired in Kentucky from employment in the military service of the United States during 1975, after 20 years of active duty. The respondent was receiving Army retired pay in the amount of Eight Hundred Eight Dollars ($808.00) per month at the initiation of the suit. Both parties were in their early 40's, and both were employed in non-military capacities.

As part of her equitable division of marital property as mandated by K.R.S. 403.190, your petitioner sought an award of a portion of the future monthly installments of retired pay received by the respondent. Evidence as to the nature, terms, and amount of Army retired pay was presented. The trial court ruled as follows in its June 4, 1979 decree:

> "The Court finds that Petitioner's military retirement pay is not 'property' subject to division by this Court under the authority of *Hisquierdo* v. *Hisquierdo*, —— U. S. ——, 99 S. Ct. 802, 47 U. S. Lw. 4141 (January 22, 1979); *Cose* v. *Cose*, Alaska Supreme Court, —— P. 2d ——, decided March 30, 1979; and *Ellis* v. *Ellis*, Colo. S. Ct. 552 P. 2d 506 (1976)."

In the *Hisquierdo* case this Court determined that federal benefits available under the Railroad Retirement Act of 1974 may not be divided as community property by state courts. This Court's decision was grounded specifically in the statutory provisions of that Act, which provisions it found to override state law interference with the direction of the benefits as mandated by the Congress. Both *Cose* and *Ellis* applied similar reasoning to military retired pay.

The Christian Circuit Court judgment was appealed by your petitioner to the Kentucky Court of Appeals. Two issues were raised and briefed, only one of which is pursued here. In the words of the Court of Appeals:

> This is our first confrontation with the question of whether a military retirement pension may be treated as marital property, divisible upon divorce. We are not concerned with the problem of whether William's pension was vested or non-vested, or whether it was contributory or noncontributory. It was vested, and it was noncontributory in the sense that it had no cash value. It was accrued totally during the marriage. *Normally, Roberta would be entitled to a share of a vested pension.* We must conclude in this case, however, that

> military retirement pay may not be considered as marital property which may be divided upon dissolution of a marriage. (Emphasis added).

After citation of several leading cases from different state jurisdictions in support of and contrary to the conclusion sought by your petitioner, the Court of Appeals discussed this Court's admittedly distinguishable *Hisquierdo* decision. It then went on to state as follows:

> It is our opinion that a disposition of military retirement benefits as divisible marital property would also conflict with the federal statutory scheme. Under the supremacy clause of the United States Constitution, an inconsistent state law must yield. U. S. Constitution, Article VI, Section 2, and *Hisquierdo, supra.*
>
> . . .
>
> Until the U. S. Supreme Court renders some definitive opinion, or until Congress clarifies the issue, this Court must consider the probable intent of Congress from the statutes, the legislative history, and the interpretations given to the statutes by the appropriate governmental agencies.

In the further course of its opinion, the Court of Appeals mentioned the statutes authorizing military retired pay, 10 *U.S.C.* Sections 3911, 3929, and 3991; Senate Report No. 1480 of the 2d Session of the 90th Congress; the Retired Serviceman's Family Protection Plan, 10 *U.S.C.* Sections 1431-1446; and several opinions of this Court dealing with federal preemption. It then affirmed the trial court judgment.

Your petitioner filed a timely Motion seeking discretionary review of the Court of Appeals opinion in the Kentucky Supreme Court. The sole issue on which review was sought was "whether the Court of Appeals properly determined that a disposition of military retired pay as divisible marital property by the Courts of this Commonwealth is prohibited under the supremacy clause of the United States Constitution." On October 7, 1980, the Kentucky Supreme Court entered the following one line order:

> The motion of Roberta Jean Galli Russell for a review of the decision of the Court of Appeals is denied.

After each party's devotion of 20 years of his still relatively young life to the trials and tribulations of military life, the respondent is to pursue other endeavors with an ever-increasing monthly retired pay check while your petitioner must be satisfied with 20 years experience as an "army wife."

ARGUMENT FOR ALLOWANCE OF THE WRIT

The question presented deserves plenary consideration for several reasons, as evidenced in part by *McCarty* v. *McCarty*, Supreme Court No. 80-5, in which this Court on October 20, 1980 postponed further consideration of the question of jurisdiction to the hearing of the case on the merits.

I. The Decision Below Conflicts With *McCarty* v. *McCarty*, Supreme Court No. 80-5, Presently on the Court's Docket, as Well as Being Representative of One Side of the Issue Which Has Split Several State Courts of Last Resort.

In *Russell* v. *Russell*, the case at bar, as followed in *Light* v. *Light*, Ky. App., —— S. W. 2d ——, 27 Ky. Law Summary 6, page 9, the Kentucky court has aligned itself with those state courts of last resort holding military retired pay not to be property divisible upon divorce. *E.g.*, *Cose* v. *Cose*, 592 P. 2d 1230 (Alas. 1979), *cert. petition docketed*, 48 U.S.L.W. 3627 (U. S. March 19, 1980) (No. 79-1469); *Ex Parte Johnson*, 591 S. W. 2d 453 (Texas 1979); *Ellis* v. *Ellis*, 191 Colo. 317, 552 P. 2d 506 (1976); *Fenney* v. *Fenney*, 259 Ark. 858, 537 S. W. 2d 367 (1976). This view is in conflict with that of several other states. E.g., *In re Marriage of Fithian*, 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P. 2d 449 (1974), as reaffirmed in *In re Marriage of Milhan*, —— Cal. 3d —— (July 17, 1980); *Miller* v. *Miller*, —— Mont. ——, 609 P. 2d 1185 (1980); *Czarnecki* v. *Czarnecki*, 123 Ariz. 466, 600 P. 2d 1098 (1979); *Kruger* v. *Kruger*, 73 N. J. 464, 375 A. 2d 659 (1977); *Ramsey* v. *Ramsey*, 96 Idaho 672, 535 P. 2d 53 (1975).

Both prior to and after this Court's decision in *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572 (1979), the states have split in their decisions on whether Congress' scheme of statutes authorizing military retirement pay prohibits state law disposition of those benefits. There is a strong federal interest in the uniform

interpretation of the statutes in issue. Each state may determine for itself whether its family law provisions encompass retirement pay, but whether federal military retirement pay is subject to state direction is a matter of substantial federal interest. To military personnel faced with a decision to retire near their last post or return to a home state, when divorce is anticipated (or at least recognized as a strong possibility), a uniform interpretation of the statutes is extremely significant.

II. The Kentucky Court Has Joined Several Other States in Misapplying This Court's *Hisquierdo* Decision.

Although the Kentucky Court of Appeals specifically recognized that the *Hisquierdo* decision "is distinguishable in some respects from our case involving military pay," it relied heavily upon that case to reach its conclusion below. In *Hisquierdo* this Court focused upon 45 *U.S.C.* Section 231m of the Railroad Retirement Act of 1974 to reach its decision. It found that provision to be controlling and prohibit state law interference with that Act's benefits. Nowhere in any state court opinion, legal memorandum or brief, has the undersigned noticed citation to any comparable statutory provision affecting military retired pay.

This Court prefaced its discussion of the merits of the issue in *Hisquierdo* with a review of the applicable law. It noted the general rule that domestic relations law is primarily a matter reserved to the states. It rejected the argument made in the abstract that the states may not create rights to federal benefits that

do not exist under federal law. It went on to define the limited scope of review under the Supremacy Clause "to a determination whether Congress has 'positively required by direct enactment' that state law be preempted. *Wetmore* v. *Markoe,* 196 U. S. 68, 77, 25 S. Ct. 172, 176 49 L. Ed. 390 (1904)". However the Kentucky Court, and the other post-*Hisquierdo* decisions purporting to follow the guidance of that case, has completely reversed this Court's rationale and sought direct authorization from the Congress that military retired pay may be divided upon divorce. While the result of this misinterpretation is to resolve perceived federal-state conflicts in favor of the perceived federal interests, it will have the ultimate result of producing more conflicts among various state interpretations of federal law and also discourage state law intervention into areas where such is warranted.

The injustice of the misinterpretation is well displayed by this case. As stated by the Kentucky Court of Appeals in its opinion, "Normally, Roberta would be entitled to have a share of a vested pension." After 20 years of following the respondent wherever his military duties took him, or raising the children alone while he was posted overseas, and uprooting the family and any career that she might begin at a given post, your petitioner is told that *somewhere* in the statutes authorizing military retired pay there is a perceived Congressional intent, though not stated specifically, that only the actual service member is to receive future benefits from the years of devotion to military life. There should be and is a strong federal interest in mak-

ing clear to the states that they are not prohibited from applying their own family law concepts to miltary retired pay in dissolution of marriage actions.

III. The Issue Is Important.

In the case at bar, your petitioner presented below expert testimony and documentary evidence based upon the present statutes as to rate of pay and the respondent's life expectancy that the commuted present value of the military retired pay in issue ranged from a conservative value of Two Hundred Sixteen Thousand Two Hundred Fifty-three Dollars ($216,253.00) to a more likely value of Three Hundred Seventy-eight Thousand Eight Hundred Thirty-three Dollars ($378,833.00). The financial stakes of whether the asset is subject to division under state law requirements are substantial. The conflict among the states based upon the federal preemption issue can only be resolved by this Court. A definitive resolution should be rendered in order that future decisions are not based upon, in the words of the Kentucky Court of Appeals, "The probable intent of Congress."

CONCLUSION

This case presents the Court with a clear-cut factual situation in which to resolve the states' authority to divide military retired pay in dissolution of marriage actions and to resolve conflicts between various state courts of last resort. It presents an important federal question both in the area of federal-state rights and in the area of federal military compensation. It presents an issue which has been erroneously resolved by the Kentucky Court, and one which will affect the livlihood of substantial numbers of American citizens who are entitled to know a definitive answer to the question presented. It is respectfully submitted that a writ of certiorari should issue to the Kentucky Court of Appeals.

Respectfully submitted,

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Wm. E. Sants

Counsel for Appellant

Date: 1-2-81

A copy of this Petition shall be served upon the Attorney General of the Commonwealth of Kentucky as 28 *US.C.* Section 2403(b) may apply.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the accompanying Entry of Appearance and Petition for a Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky has been served in compliance with the Rules of this Court by hand-delivery of 3 copies of the Petition and 1 copy of the Entry of Appearance to John M. Dixon, Jr. and J. Daniel Kemp, Turner, Dixon & Kemp, Weber Building, Hopkinsville, Kentucky, respondent's counsel below, and by mailing, first-class postage prepaid, 3 copies of the Petition and 1 copy of the Entry of Appearance to the respondent William Lee Russell at 255 Kingsway, Frankfort, Kentucky 40601, on the 2d day of January, 1981.

APPENDIX

APPENDIX A

OPINION RENDERED: APRIL 25, 1980
TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

79-CA-1502-MR

ROBERTA JEAN GALLI RUSSELL and
KEITH AND MEYERS - - - - - *Appellants*

v.

WILLIAM LEE RUSSELL - - - - - *Appellee*

Appeal from Christian Circuit Court
Honorable Stephen P. White, Jr., Judge
Action No. 78-CI-291

AFFIRMING

BEFORE: BREETZ, HOWERTON, and REYNOLDS, Judges.

HOWERTON, JUDGE. Roberta Russell appeals from a judgment of the Christian Circuit Court determining that William Russell's military retirement pay was not marital property subject to division. She argues in the alternative that if it is determined that his pension is not a divisible marital asset, she is entitled to maintenance based on his ability to pay. She also contends that the trial court erred by failing to award her a fee for her attorney.

The Russells were married for more than 24 years. William is now retired from the United States Army. He

receives a monthly retirement pension in the amount of $808.00. He is employed as a helicopter pilot for the Commonwealth of Kentucky and earns an additional gross salary of $1,338.00 per month. At the time of the dissolution, Roberta was earning $1,600.00 per month as an employee with the Department of the Army at Ft. Campbell, Kentucky. The trial court found both parties to be in good health and able to provide for their own reasonable needs.

The net marital estate was determined to be $47,273.49. Of that amount, Roberta received $25,431.74 and William received $21,841.75. The trial court specifically determined that the military retirement pay could not be considered part of the marital estate.

Whether any pension may be considered marital property has been considered in various cases on the basis of whether it was vested or nonvested at the time of dissolution, or whether it was contributory or noncontributory, and whether it was based on federal statutes, such as the Railroad Retirement Act. *Frost* v. *Frost,* Ky. App., 581 S. W. 2d 582 (1979); *Ratcliff* v. *Ratcliff,* Ky. App., 586 S. W. 2d 292 (1979); *Foster* v. *Foster,* Ky. App., 589 S. W. 2d 223 (1979); and *Beggs* v. *Beggs,* Ky., 479 S. W. 2d 598 (1972). This is our first confrontation with the question of whether a military retirement pension may be treated as marital property, divisible upon divorce.

We are not concerned with the problem of whether William's pension was vested or nonvested, or whether it was contributory or noncontributory. It was vested, and it was noncontributory in the sense that it had no cash value. It was accrued totally during the marriage. Normally, Roberta would be entitled to a share of a vested pension. We must conclude in this case, however, that military retirement pay may not be considered as marital property which may be divided upon dissolution of a marriage.

Several jurisdictions have held that military retirement pay is community property, divisible upon divorce, rather than future income for the retiree. *Dominey* v. *Dominey,* 481 S. W. 2d 473 (Tex. Civ. App. 1972); *In Re The Marriage of Fithian,* Cal. 517 P. 2d 449 (1974); *Ramsey* v. *Ramsey,* Idaho 535 P. 2d 53 (1975), and *Kruger* v. *Kruger,* N.J. 375 A. 2d 659 (1977). These cases are persuasive, but they are not binding in this jurisdiction. Furthermore, other courts have rejected such reasoning and held that military retirement pay is not divisible property. *Ellis* v. *Ellis,* 552 P. 2d 506 (Colo. 1976); *Fenney* v. *Fenney,* 537 S. W. 2d 367 (Ark. 1976), and *Cose* v. *Cose,* 592 P. 2d 1230 (Alas. 1979). Although it is distinguishable in some respects from our case involving military pay, the case of *Hisquierdo* v. *Hisquierdo,* ____ U. S. ____, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979), held that benefits under the Railroad Retirement Act may not be considered community property. The California court held that railroad retirement pay was divisible community property, but the U. S. Supreme Court determined that the state's ruling conflicted with the federal statutory scheme for allocating railroad retirement benefits.

It is our opinion that a disposition of military retirement benefits as divisible marital property would also conflict with the federal statutory scheme. Under the supremacy clause of the United States Constitution, an inconsistent state law must yield. U. S. Constitution, Article VI, § 2, and *Hisquierdo, supra.*

Although the U. S. Supreme Court denied certiorari in *In Re The Marriage of Fithian, supra,* 419 U. S. 825, 95 S. Ct. 41, 42, L. Ed. 2d 48 (1974), it has not yet made a determination regarding military pensions as marital property. Until the U. S. Supreme Court renders some definitive opinion, or until Congress clarifies the issue, this Court must consider the probable intent of Congress from the

statutes, the legislative history, and the interpretations given to the statutes by the appropriate governmental agencies.

William Russell receives his army retirement pay pursuant to 10 *U.S.C.* §§ 3911, 3929 and 3991. The benefit is nowhere referred to as property—divisible property, marital property, or community property. In the U. S. Senate, it was said, "[h]istorically, military retired pay has been a personal entitlement payable to the member himself as long as he lives." *S. Rep. No. 1480,* 90th Cong., 2nd Sess. (1968); *U. S. Code Cong. & Ad. News,* at 3294, 3300 (1968).

In 1968, Congress amended the military retirement plans in order to permit a serviceman to use a portion of his retirement pay to purchase an annuity for his survivors. Retired Serviceman's Family Protection Plan, 10 *U.S.C.* §§ 1431-1446. Participation is voluntary, and if he so chooses, a deduction from the retirement pay will be taken monthly in order to purchase a survivor's annuity of up to fifty-five percent (55%) of the pension. If a wife cannot qualify as a beneficiary, she will be ineligible to receive any benefit, and there will be no deductions from the serviceman's retirement pay to provide for the annuity.

Section 1434 provides that an annuity may be made payable, "(1) to, or on behalf of, the surviving spouse, ending when the spouse dies or remarries; . . . ." Section 1435 lists as an eligible beneficiary, "(1) the spouse of the member on the date when the member is retired or becomes entitled to retired or retainer pay . . . ." The obvious intent of these statutes is to allow an annuity for a "spouse." The right is not a property right to be sold or disposed of or especially to be passed on to an heir or future husband. It ends when the spouse dies or remarries. But for the dissolution of the marriage, Roberta could have been an eligible beneficiary. She was the spouse of William on the

date he retired and also on the date he began receiving his retired pay.

If a serviceman's retired pay is considered marital property, it would compel the serviceman to share his pay with an ex-wife whom Congress has declared ineligible for coverage. The Defense Department explained that the purpose of the plan was, "to safeguard the participant's future retired pay when . . . a divorce occurs." S. Rep. No. 1480, *supra,* at 3307. The same factors apply to the Armed Forces Survivor Benefit Plan. 10 *U.S.C.* §§ 1447-1455. A divorced spouse may not participate. The benefits are payable to a surviving wife, but not a surviving ex-wife.

We cannot rewrite the federal statutes to permit military retirement pay to become a property right of ex-spouses. If we could, a portion of the retirement pay could be awarded to the divorcing spouse and become that person's absolute property. If that person remarried and predeceased the retiree, the absolute property right would continue to that person's heirs or designated beneficiary. Such a result is totally inconsistent with the intent and the provisions of the federal statutes.

Hisquierdo, supra, did provide that state family and property law must do major damage to the clear and substantial federal interests before the supremacy clause of the Constitution will dictate that state laws be overruled. We must conclude, however, that the federal statutory provisions relating to military retirement pay are in conflict with any Kentucky requirement that certain types of retirement pay be considered as divisible marital property.

The decisions of the U. S. Supreme Court in *Wissner* v. *Wissner,* 338 U. S. 655, 70 S. Ct. 398, 94 L. Ed. 424 (1950), and *Free* v. *Bland,* 39 U. S. 663, 82 S. Ct. 1089, 8 L Ed. 2d 180 (1962), are significant, if not dispositive of this case along with *Hisquierdo, supra. Wissner* involved National Service Life Insurance, and *Free* involved a United States savings bond. Neither of these items could be considered

community property. The preemption doctrine disallowed it. We see no proper way to distinguish the restrictions in the federal statutes pertaining to servicemen's life insurance and United States savings bonds and those statutes we have cited pertaining to military retirement pay.

One might argue that by declaring the military pension to be marital property, and therefore divisible, that the retiree, or eligible but future retiree, would have to pay for the spouse's interest. William Russell, and many people eligible for retirement (over 20 years of service), are middle-aged individuals with 25 or more years of estimated life expectancy. With a retirement pay in excess of $800.00 per month, an award of 40 to 50 percent would absolutely bankrupt most retirees. If the payment of the award was to be made out of future pension payments, and if the concept of a property right was followed, an enormous and unfair debt could be owing by the estate of the retiree if he died prior to satisfying the award. The value of the property right would exist, but the pension as a source of satisfaction would not continue.

Our conclusion to exclude military retirement pay from divisible marital property in no way precludes a trial court from considering such an asset when determining an appropriate amount for maintenance and support. KRS 403.200. If maintenance is appropriate, the income will be available to satisfy a reasonable award, especially if there are few other assets or resources to be divided. In many cases a military pension may be the only significant asset in a family, and a spouse must not be left destitute and without some support, simply because the pension is not divisible property.

Roberta argues that she is entitled to maintenance, if she is not awarded a portion of the retirement pay. It is obvious that the trial judge considered the factor of mili-

tary retirement pay in resolving this case. Roberta received over 50% of the marital property, and her earnings are greater than William's, exclusive of his retirement pay. The trial court specifically found that both parties are able to support themselves. When we consider all the factors in this case, we cannot say that the trial judge abused his discretion in refusing to award maintenance or to grant her a larger share of the total assets accumulated during the marriage.

Roberta finally argues that the court erred in refusing to award her a reasonable amount for her attorney's fee. The trial court has a broad latitude in determining whether to assess attorney fees in a dissolution of marriage. It appears from the record that the trial judge thoroughly considered the provisions of KRS 403.220 and the appropriate standards for awarding such fees. We cannot say that the court abused its discretion in requiring each party to pay for his own attorney. Roberta is certainly not destitute. She has substantial funds of her own and she received a reasonable distribution of the property.

The judgment of the trial court is affirmed.

ALL CONCUR.

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APPENDIX B

SUPREME COURT OF KENTUCKY

80-SC-354-D

(79-CA-1502-MR)

ROBERTA JEAN GALLI RUSSELL - - - - - *Movant*

v.

WILLIAM LEE RUSSELL - - - - - *Respondent*

Christian Circuit Court
78-CI-291

ORDER DENYING DISCRETIONARY REVIEW

The motion of Roberta Jean Galli Russell for a review of the decision of the Court of Appeals is denied.

ENTERED October 7, 1980.

(s) James S. Palmore
Chief Justice

APPENDIX C

CHRISTIAN CIRCUIT COURT

Civil Action No. 78-CI-291

WILLIAM LEE RUSSELL, - - - - *Petitioner,*

v.

ROBERTA JEAN GALLI RUSSELL, - - - *Respondent.*

IN RE: The Marriage of William Lee Russell and Roberta Jean Galli Russell; and the Custody and Support of Carrie Russell.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECREE OF DISSOLUTION AND JUDGMENT—Entered June 4, 1979

This cause having been submitted on the pleadings and the proof, it appearing that both parties are properly before this Court for purposes of this action, and after considering the pleadings and the evidence and the Report of the Master Commissioner, the Court, being fully and sufficiently advised, makes the following:

FINDINGS OF FACT

1. Petitioner and Respondent have both continuously resided in the Commonwealth of Kentucky for a period in excess of 180 days next preceding the filing of the Petition for Dissolution of Marriage in this action on May 23, 1978.

2. Petitioner and Respondent were married to each other on December 31, 1954, in Detroit, Michigan, where the marriage is registered.

3. Petitioner and Respondent separated on or about February 22, 1978, and they have been continuously separated for more than 60 days prior to entry of the Final Decree in this action.

4. The marriage between the parties is irretrievably broken, there being no reasonable prospect for reconciliation.

5. The parties have one minor child, Carrie Russell, age 17 years, and it is in her best interest that Respondent be awarded her custody. Two hundred dollars ($200) per month is a reasonable amount of child support for Petitioner to pay Respondent until the said child reaches the age of 18, marries, or becomes self-supporting. Respondent is not now pregnant.

6. Petitioner is the only party with significant non-marital property, and some of this property is assignable to the Petitioner in kind, while some of Petitioner's non-marital property is cash which Petitioner traced to current marital assets in the form of personal property and real estate. Items which are assignable to Petitioner under KRS 403.190 in kind are as follows:

a. American Telephone & Telegraph stock
b. 1/2 interest in house and lot in Detroit, Michigan
c. 1/4 interest in subdivision lots in Muscle Shoals, AL
d. Cash in certificate of deposit with Manufacturer's National Bank of Detroit, Michigan, in the principal amount of $20,000, plus accrued interest.

The cash represented by the certificate of deposit mentioned above was a gift to Petitioner from his father and should be assigned to Petitioner. The Court attaches no

legal significance to the fact that this certificate of deposit is currently held in the joint names of Petitioner and Respondent.

Petitioner received a cash inheritance from his mother in 1977 in the approximate amount of $17,000. Some of this money was spent for living expenses and is not traceable. However, the Petitioner traced into current marital assets the following amount of cash which are assignable to Petitioner under KRS 403.190:

$2,000—cash used as down-payment on 1977 Thunderbird automobile which cost originally $8,400 and which has a current debt against it of approximately $5,000. This $2,000 can be assigned to Petitioner by simply assigning him the Thunderbird automobile since the debt against the automobile is approximately as much as the current value of the car.

$2,000—cash down-payment on five acres of land located near Herndon, KY. This land has a current value of $5,000 and there is a $2,000 debt against the land.

$2,800—cash used to pay off the indebtedness owed on a boat and motor which originally cost $4,800 and was valued during the proof taking of this case at $2,500 current value. The ratio of the amount of nonmarital cash applied to the total cost of the boat ($2,800/$4,800) multiplied by the current value of the boat ($2,500) equals an amount assignable to the Petitioner from the boat of $1,458.

$1,700—cash invested in an airplane which originally cost $12,500 and is currently worth $14,500. There is also a debt of approximately $6,000 against the airplane, making the current net value approximately $8,500. The amount of cash contributed to the cost of the airplane ($1,700) divided by the cost

of the airplane ($12,500) multiplied by the current value ($14,500) equals an amount restorable of $1,972.

7. The marital assets and liabilities of the parties are as follows:

ASSETS	Value in Marital Estate
a. Airplane	$14,500.00
b. Five acres of land, Herndon, KY	5,000.00
c. House and lot, 903 Springmont Drive, Hopkinsville, KY (using average of two appraisals)	45,000.00
d. Furniture and appliances in marital residence (using average of two appraisals)	4,750.00
e. Cameras and guns	3,000.00
f. 1975 Datsun	2,500.00
g. Hopkinsville Elevator stock	500.00
h. Horse	100.00
i. Respondent's life insurance cash value	436.00
j. Petitioner's life insurance cash value	3,465.00
k. Note from Bryan Ezell	1,000.00
l. Respondent's retirement fund, cash value	5,374.74
m. Petitioner's Kentucky state retirement, cash value	1,577.75
n. Petitioner's car (value all nonmarital)	–0–
o. Boat	2,500.00
p. Furniture in Petitioner's apartment	1,000.00
TOTAL ASSETS	$90,703.49

LIABILITY	Amount
a. Nonmarital interest in airplane	$ 1,972.00
b. Nonmarital interest in boat	1,458.00
c. Debt on airplane	6,000.00

d. Mortgage on residence	30,000.00
e. Debt on land, Herndon, KY	2,000.00
f. Nonmarital interest in five acres of land ..	2,000.00
TOTAL LIABILITIES	$43,430.00
NET MARITAL ESTATE	$47,273.49

8. Petitioner is currently earning from his military retirement the sum of $808 per month. Petitioner is also earning from his Kentucky state employment as an airplane pilot the gross sum of $1,338 per month. Respondent earns $1,600 per month from her job with the Department of Army at Fort Campbell, Kentucky. Both Petitioner and Respondent are in good health and each can provide for his own reasonable needs.

9. The Court finds that Petitioner's military retirement pay is not "property" subject to division by this Court under the authority of *Hisquierdo* v. *Hisquierdo,* ____ U.S. ____, 99 S. Ct. 802, 47 U. S. Lw. 4141 (January 22, 1979); *Cose* v. *Cose,* Alaska Supreme Court, ____ P. 2d ____, decided March 30, 1979; and, *Ellis* v. *Ellis,* Colo. S. Ct. 552 P. 2d 506 (1976).

CONCLUSIONS OF LAW

1. Both parties are properly before this Court for the purposes of this action.

2. The marriage between the parties is irretrievably broken and should be dissolved, and a Decree dissolving the marriage should be issued.

3. It is in the best interest of the parties' only minor child, Carrie Russell, age 17 years, that her custody be awarded to Respondent. Considering the relative financial resources of the parties, the short duration of the child's remaining minority, and the other factors enumerated in

KRS 403.210, Petitioner should pay to Respondent Two Hundred Dollars ($200) per month for the support of their minor daughter.

4. All of Petitioner's nonmarital property mentioned in Finding of Fact No. 6 should be set aside to him, and Respondent should immediately return to Petitioner those items of his nonmarital property which she is currently holding, including his AT&T stock certificates and the $20,000 certificate of deposit. Further, Respondent should immediately return to Petitioner those life insurance policies which she currently has in her possession and which belong to Petitioner and are on his life; and Respondent should be ordered to return to Petitioner all of his personal items in her possession, including all furniture and assorted items from the estate of Petitioner's mother, Petitioner's hunting equipment, gun case and contents, Petitioner's Winchester .22 single shot rifle which was a gift from his father, Petitioner's hunting knives, duck decoys, bow and arrows, wood duck print, charcoal drawing of Petitioner's horse, one Texan saddle, one-half of all the horse tack, hunting coat and apparel, professional books, photography books and developing equipment, and aviation books. Petitioner should have assigned to him as nonmarital property his 1977 Thunderbird automobile and he should assume the debt on said automobile. Petitioner should receive a cash credit against the proceeds from the sale of the marital residence in the amount of $1,458 representing his nonmarital interest in the boat and motor. Petitioner's nonmarital interest in the five acres of land at Herndon, Kentucky, can be realized after the sale of the said land, and his nonmarital interest in the airplane should be assigned to him together with the airplane itself which the Court intends to assign to Petitioner as a portion of his share of the Marital property.

5. The marital property should be divided equally between the parties. Considering that the parties' only

minor child will reach the age of majority in August of 1979, the division of the parties' interest in the marital residence and satisfaction of the principal marital liabilities should be made from the sale of the residence and the sale of the five acres of land located near Herndon, Kentucky. After payment of the existing indebtedness and after restoration to Petitioner of his $2,000 nonmarital interest in the five acres at Herndon, Kentucky, and his nonmarital interest in the boat and motor of $1,458, the remaining net proceeds should be divided equally between Petitioner and Respondent. At Respondent's option, the house may be immediately listed for sale with a real estate office; but, if no contract for sale has been entered within ninety (90) days from the date of the Final Decree entered herein, the matter should be referred to the Master Commissioner of this Court for sale of both parcels of real estate at public auction.

6. The Respondent should receive, as a division of marital property, the following items:

Item:		Value
a. 1975 Datsun		$ 2,500.00
b. Her retirement cash value		5,374.74
c. Her life insurance cash value		436.00
d. ½ of net proceeds from sale of residence at 903 Springmont Drive and five acres of land located at Herndon, KY	$50,000.00	
Less nonmarital interest in land and boat	– 58.00	
	$46,542.00	
Less indebtedness	–32,000.00	
Equals estimated net proceeds of	$14,542.00	7,271.00

e.	All furniture and furnishings, guns, cameras and equipment currently in her possession, with the exception of those personal items belonging to the Petitioner which were previously listed in Conclusion of Law No. 4	
	(furniture)	4,750.00
	(guns & cameras)	1,500.00
f.	Boat and motor	2,500.00
g.	Hopkinsville Elevator Stock	500.00
h.	Horse	100.00
i.	½ of proceeds from note of Bryan Ezell	500.00
	TOTAL	$25,431.74

7. Petitioner should receive, as his division of the marital property, the following:

Item:		Value
a.	½ of proceeds from the sale of the house and the five acres of land	$ 7,271.00
b.	Furniture in his possession and those items personal to him listed in Conclusion of Law No. 4	1,000.00
c.	His state retirement cash value	1,577.75
d.	His life insurance cash value	3,465.00
e.	½ of proceeds from note of Bryan Ezell	500.00
f.	All guns and cameras and other personal items currently in his possession	1,500.00
g.	Airplane, net value after deducting non-marital interest	6,528.00
	TOTAL	$21,841.75
	TOTAL MARITAL PROPERTY	$47,273.49

Although the above does not effect an exactly equal dollar division of property between Petitioner and Respondent,

the Court believes that the above division is reasonable under the circumstances, considering the difficulties in placing values on assets and the necessary estimations involved.

8. Considering the property division made above and considering Respondent's income from her employment and her retirement plan, Respondent has sufficient property to provide for her reasonable needs. Therefore, Respondent is not entitled to maintenance under the provisions of KRS 403.200.

9. Petitioner should pay the Court costs of this action, and each of the parties should pay their own attorney's fees.

10. Respondent having so requested, should have her maiden name "Galli" restored to her.

FINAL DECREE OF DISSOLUTION AND JUDGMENT

IT IS, THEREFORE, ORDERED AND ADJUDGED AS FOLLOWS:

1. The marriage between Petitioner and Respondent is hereby dissolved, and each of them is restored to all the rights and privileges of an unmarried person.

2. The custody of Carrie Russell is awarded to the Respondent, and the Petitioner shall pay to Respondent the sum of Two Hundred Dollars ($200) per month for the support of Carrie Russell during the remaining months of her minority.

3. The assets and liabilities of the parties or either of them, as identified in the foregoing Findings of Fact and Conclusions of Law, is set apart and assigned to each respective party as set forth in the Conclusions of Law. Each party shall do all things necessary to carry into effect the aforesaid award of property. If no contract for the sale of the parties' residence has been entered into within ninety

(90) days from the date of this Decree, the matter is hereby referred to the Master Commissioner of this Court for sale of the residence at public auction.

4. Respondent's maiden name "Galli" is hereby restored to her.

5. The Master Commissioner of this Court is hereby empowered and directed to carry out the terms of this Judgment in the event either of the parties herein is unwilling or unable to comply with this Judgment, and the Master Commissioner is specifically empowered with the authority to convey real estate under the said circumstances.

6. Petitioner shall pay the Court costs herein, and each of the parties shall pay their own attorney's fees.

Entered this 4th day of June, 1979.

(s) Stephen P. White, Jr.
Judge, Christian Circuit Court
Hopkinsville, Kentucky

APPENDIX D

403.190. Disposition of Property.—(1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(b) Value of the property set apart to each spouse;

(c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent;

(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation;

(d) Property excluded by valid agreement of the parties; and

(e) The increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.

(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

581 S. W. 2d 582

MARION LOUISE FROST, APPELLANT,

v.

WILLIAM H. FROST, APPELLEE.

Court of Appeals of Kentucky.

May 11, 1979.

Before GANT, HAYES and HOWARD, JJ.

HAYES, Judge.

Marion and William Frost were married thirty-five years. At the time of dissolution of their marriage their ages were respectively, fifty-two and fifty-three. During most of the marriage, William had been a railway employee. Marion had occasionally worked as a science teacher, but could obtain only emergency certificates as she does not have the credits in education which the state requires for teacher certification.

Upon dissolution, Marion was awarded, in addition to four years of maintenance, various items worth several thousand dollars, three years of use of the family home and one-half the equity to be derived from the sale of the home at the end of that period.

[1] She now appeals from the division of property. Her main allegation of error is that in view of the fact that the tangible marital estate was relatively small and that William's pension and annuity rights had been accrued entirely during the marriage, that she should have been awarded some interest in those future rights.

This court would willingly accept her contention that William's future retirement benefits should be treated as marital property, but we are prevented from doing so by a recent decision by the United States Supreme Court.

Because William is a railroad employee, his pension and annuity plan is governed by the Railroad Retirement Act of 1937, 45 U.S.C. § 228a *et seq.* Section 228e of the Act provides that a former spouse has no direct entitlement to benefits if the marriage has been terminated before benefits begin. Section 231m provides that:

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated: *Provided, however,* That the provisions of this section shall not operate to exclude the amount of any supplemental annuity paid to an individual under section 2(b) of this Act [45 USCS § 231a(b)] from income taxable pursuant to the Federal income tax provisions of the Internal Revenue Code of 1954. [Citations omitted].

A majority of the United States Supreme Court in *Hisquierdo* v. *Hisquierdo,* ____ U. S. ____, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979) have now held that this exemption from process extends to division and assignment of benefits under state dissolution of marriage schemes. (The court made that clear that while a pensioner's rights cannot be directly assigned, it is permissible to make awards of maintenance and child support which take account of those funds as constituting all or part of the obligor's ability to pay.) This interpretation of the Railroad Retirement Act is, of course, binding upon us. The Supremacy Clause of the United States Constitution dictates that the provision of the Railroad Retirement Act must prevail over any conflicting provisions of Kentucky law. Thus we must hold that the trial court did not err in its refusal to consider William's future benefits, but we caution readers of this

decision that the result was dictated by the atypical circumstance of coverage by the Railroad Retirement Act.

[2] Marion also contends that the trial court's limitation of her maintenance award to four years at $450.00 per month constitutes an abuse of discretion.

Kentucky has established the following statutory guidelines for trial courts in determining the appropriateness, amount, and duration of maintenance:

> 403.200. Maintenance—Court may grant order for either spouse.—(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
>
> (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
>
> (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.
>
> (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance. (Enact. Acts 1972, ch. 182, § 10.)

The trial court obviously found that Marion Frost's financial condition was such that she met the threshold requirements of section (1), and would in all likelihood continue to meet them for four years. The question now before us is whether the court abused its discretion in failing to award permanent maintenance.

We will assume, for purposes of this discussion, that at the time the temporary award of maintenance is due to expire, Marion Frost will have obtained a teacher's certificate—that is the course of action which William appears to be vigorously urging upon her. At that time Marion may well be able to find regular and fairly well-paid employment. (Given her age and the notorious difficulty, in many parts of the country at least, of finding full-time regular employment as a teacher, our assumptions might be overly optimistic.) In any event, even according to the rosiest scenario that we can devise, Marion will have only an absolute maximum of ten (assuming employment at age 55 and retirement at age 65) to fifteen (assuming retirement at age 70) years in the work force. Retirement benefits accrued in such a short time simply cannot, under any retirement

scheme that we know of, be of such magnitude as to help significantly in paying living expenses.

Because William was covered by the Railroad Retirement Act, the couple made no contributions to the Social Security retirement system; thus Marion can look forward to no benefits accrued during the marriage.

One-half of the equity in the couple's home should represent a substantial lump sum, but it will be subject to capital gains tax and will not be of such magnitude as to be capable of producing enough to live on in retirement years.

KRS 403.200(2) *supra,* directs trial courts, in deciding the amount and duration of a maintenance award, to consider all relevant factors, specifically including the ability of the party seeking maintenance to meet his needs independently, the duration of the marriage, and the age of the party seeking maintenance.

We do not believe that the trial court could have fully considered those factors and still have awarded only relatively short-term temporary maintenance. It is abundantly clear that even if Marion can become temporarily economically independent, she must relapse into dependency within a relatively few years.

We would add that we cannot approve, as a general proposition, the practice of granting maintenance for a set term of years. Such an approach may be valid when the party receiving maintenance will clearly be self-sufficient at the end of that period, but not before. Moreover, the unpredictability of the job market and of individual occupational progress make such results impossible to insure, and an absolutely limited grant of temporary maintenance does not allow either party to reopen and show changed or unexpected circumstances.

We recognize that it would be at least as great an evil to encourage the granting of permanent or indefinite main-

tenance in every instance, and have no intention of encouraging such a result.

[3] In instances where one party is not, at the time of dissolution, self-supporting, it is proper for the trial court to take evidence as to that person's prospects for becoming economically independent, and also as to how long it is likely to be before such prospects are realized. Where it appears that a maintenance award should be of limited duration, it would be much better policy for the trial court to treat any fixed time span arrived at as a mere presumption of a reasonable period for the achievement of economic independence, which may be overcome upon a showing by either party. Nothing we have said shall be construed as removing from the party receiving maintenance the duty of making every effort to become self-supporting.

Thus we reverse and remand on the issue of duration of maintenance. We direct the trial court to consider realistically Marion's lack of ability to provide for herself after retirement age and to arrive at a maintenance order which fully reflects that circumstance.

All concur.

589 S. W. 2d 223

CHARLES H. FOSTER, APPELLANT,

v.

WANELL BAIZE FOSTER, APPELLEE.

WANELL BAIZE FOSTER, CROSS-APPELLANT,

v.

CHARLES H. FOSTER, CROSS-APPELLEE.

Court of Appeals of Kentucky.

Aug. 24, 1979.

Rehearing Denied Nov. 2, 1979.

Before GANT, COOPER and HOWERTON, JJ.

GANT, Judge.

The parties hereto divorced after 30 years of marriage, the lower court awarding one-half of the marital property to each spouse, providing for maintenance for the wife for five years, and further granting the wife one-third of the future benefits received by the husband in his pension upon retirement. This appeal and cross-appeal are primarily concerned with the division of the pension benefits.

The husband, 58 years of age, has worked for American Synthetic Rubber Co. for 19 years. His pension plan provides monthly payments upon retirement based on $10.00 multiplied by the number of years of continuous service. Although contribution to the fund was made solely by the employer, the plan had been amended to comply with the requirements of the Employee Retirement Income Security Act (ERISA), and was fully vested under the provisions of that Act and the plan itself because of the length of service and the age of the husband. The plan further provided for disability benefits and for reduced monthly benefits upon early termination of employment.

There is a conflict among the states which have faced the question of whether a noncontributory retirement or pension plan is marital or nonmarital property. *See Phillipson* v. *Board of Admin. Pub. Emp. Ret. Sys.*, 3 Cal. 3d 32, 89 Cal. Rptr. 61, 473 P. 2d 765 (1970); *In re Marriage of Fithian*, 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P. 2d 449 (1974); *In re Marriage of Brown*, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P. 2d 561 (1976), all holding said funds marital property and subject to division; *In re Marriage of Ellis*, 538 P. 2d 1347 (Colo. App. 1975), and *Ellis* v. *Ellis*, 552 P. 2d 506 (Colo. 1976), both holding said plans nonmarital. We feel that the direction of the Kentucky courts has been set by *Beggs* v. *Beggs*, Ky., 479 S. W. 2d 598 (1972). Although that case concerned a contributory fund, in contrast to the noncontributory fund in the instant case, the vested rights, not the contribution of the teacher, were determinative. Even though this pension plan was noncontributory, it was a part of the consideration earned by the husband during marriage. In addition, and most importantly, it was vested so that the husband was entitled to receive monthly payments upon termination for any cause, with only the amount to be fixed.

[1] It is therefore our opinion, under these circumstances in which the husband had received the benefits of this plan for 19 years, and his rights had become vested, all of which occurred during the marriage, his retirement plan is marital property, subject to proper division.

[2] The wife, as cross/appellant, urges that the 50/50 ratio used for other property should be utilized in this division, asking for a lump-sum payment of the present value or 50% of the value at retirement. The actuary in this case placed the present value of the pension at $21,-181.90. However, the husband is not entitled, at any time, to draw a lump-sum payment, and his rights and benefits are prospective only. We feel that the lower court was

correct in making the rights of the spouse equally prospective, and do not consider the ratio of two-thirds/one-third inequitable. The wife is not entitled to share in any pension benefits earned after divorce and before retirement, and it would clearly be possible for this pension to increase by $70.00 a month before retirement. We therefore find no abuse of discretion by the lower court.

The claim of the wife/cross-appellant that the court did not include the bank accounts in the division of property is without merit.

The judgment is affirmed.

All concur.

586 S. W. 2d 292

JOAN ELIZABETH RATCLIFF, APPELLANT,

v.

ROBERT LEE RATCLIFF, APPELLEE.

Court of Appeals of Kentucky.

Aug. 24, 1979.

Before HAYES, LESTER and WHITE, JJ.

HAYES, Judge.

Pursuant to the dissolution of the marriage of Joan and Robert Ratcliff, the Bullitt Circuit Court took two actions which are now complained of by Joan. Custody of the couple's four-year-old son, Robert, was awarded to his father, and the trial court refused to consider as marital property the value of Robert's employer's contribution to Robert's pension account.

[1] We will first consider the award of custody which provided for reasonable visitation rights to the mother. Joan argues that an award of legal custody to Robert is a *de facto* award of custody to his mother, and that we should thus consider this case as involving the rights of a natural parent, the mother, vis a vis those of a third party, the grandmother. The record indeed reflects that Robert Sr., in whose custody the child has been since the couple separated, delegates a great deal of child care to his mother, who is retired. The court was fully aware of this circumstance, and indeed considerable evidence was heard as to Robert Jr.'s relationship with his grandmother. Most of that evidence was favorable. We recognize that any custodial parent who works for a living must make suitable arrangements for child care during the time that he or she is at work. We do not believe that Robert Sr.'s arrangement with his mother goes beyond that to an abdication of

custody. It is still Robert Sr. who bears the responsibility for support of Robert Jr. and for the major decisions affecting the child's future, *i. e.* schooling, residence, etc.

[2] Joan also argues that the custody award was influenced by irrelevant evidence as to her marital misconduct. We agree that that evidence, which was rather extensive, was not the proper subject for the court's consideration and that most of it could perhaps have been excluded. (We might feel more strongly had not Joan herself opened the door to the testimony complained of.) The court's findings, however, reveal that the decision was not based on any irrelevant considerations. The court did not find Joan unfit, but found the best interests of the child to lie in custody by the father, based on consideration of a number of relevant and appropriate factors. There is ample evidence to support such a determination, and given a trial court's broad discretion in such matters, we will not disturb the decision below.

[3] We also hold that there was no error in excluding the employer's contribution to Robert's pension plan during the marriage. We consider not the source of the contribution, but rather whether a party's rights in the fund have vested. We consider nonvested amounts in pension funds to be too speculative to treat as marital property.

[4] There is one context in which it would not be inappropriate to consider the value, however speculative, of such nonvested rights. KRS 403.190(1) calls upon courts to divide marital property in "just proportions." Courts are directed to consider all relevant factors, including several enumerated in the statute. Subsection (d) shows one of the named factors to be, "[e]conomic circumstances of each spouse when the division of property is to become effective . . . ." A nonvested or contingent amount in a pension fund can, where equity so requires, be viewed as an

"economic circumstance," even though the nonvested fund is not marital property and therefore cannot be divided. In the instant case, we believe that the court arrived at a just division of marital property whether or not contingent pension amounts were considered.

We affirm the Bullitt Circuit Court.

All concur.